Supreme Court, U.S.
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No. 03 1211 FEB 18 2004

In the Supreme Court of the United States

JOHN MACLACHLAN; JAMES BROWN; STEPHEN K. MANLEY; ALAINA SPURLOCK; BERND STAHR; MICHAEL ZAIONTZ, on behalf of themselves and all others similarly situated,

PETITIONERS

VERSUS

EXXON MOBIL CORP., [Successor by Merger to Mobil Corporation], as Trustee Administrator and Fiduciary of Retirement, Savings, Severance, Separation, Insurance, and other miscellaneous employee benefits/Welfare Plan of Mobil Corporation; THOMAS C. HARRISON, as Assistant Administrator Benefits of Benefits of Exxon Mobil Corporation, Retirement, Savings, Severance, Separation, Insurance, and other miscellaneous benefits plans of Exxon Mobil Corporation; RETIREMENT PLAN, also known as Mobil Retirement Plan; COMPREHENSIVE MEDICAL PLAN, also known as Mobil Medical Plan; DENTAL ASSISTANCE PROVISIONS, also known as Mobil Dental Plan; DEPENDENT GROUP LIFE INSURANCE PLAN, also known as Mobil Group Life Insurance Plan; DISABILITY INCOME PLAN; EMPLOYEE STOCK OWNERSHIP PLAN, also known as Mobil Stock Plan; EMPLOYEE SAVINGS PLAN, also known as Mobil Savings Plan; LIFE INSURANCE PLAN, also know as Mobil Life Insurance Plan; PRE-SOCIAL SECURITY PLAN, also known as Mobil Pre-Social Security Plan; TERMINATION ALLOWANCE PLAN; EMPLOYEE SEVERANCE PLAN, also known as Mobil Severance Plan; EMPLOYEE SEPARATION BENEFIT PLAN, also known as Mobil Separation Benefit Plan,

RESPONDENTS

CIVIL APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1) Whether a plan administrator abuses his discretion in excluding coverage to employees, whose status as common law employees is uncontested, and who are not otherwise expressly excluded under the employer's ERISA governed plans.

2) Whether a plan administrator abuses his discretion in interpreting undefined plan terms contrary to federal common law, or another statutory or regulatory standard.

3) Whether common law employees can be discriminated against as a class of employment in a benefits plan governed under ERISA.

LIST OF PARTIES

Plaintiffs—Appellants:	John Maclachlan James Brown Stephen K. Manley Alaina Spurlock Bernd Stahr Michael Zaiontz
Defendants—Appellees:	Exxon Mobil Corporation Thomas C. Harrison Retirement Plan Comprehensive Medical Plan Dental Assistance Provision Dependent Group Life Insurance Disability Income Plan Employee Stock Ownership Plan Employee Savings Plan Life Insurance Plan Pre-Social Security Plan Termination Allowance Plan Employee Severance Plan Employee Separation Benefit Plan

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The opinion of the Fifth Circuit Court of Appeals rendered November 20, 2003, is reported at 350 F.3d 472 (5th Cir. 2003). The opinions of the District Court rendered September 18, 2002, and December 5, 2002, are unreported.

JURISDICTION

The Judgment of the Fifth Circuit Court of Appeals was entered on November 20, 2003. This Petition for Writ of Certiorari is sought within 90 days of the Judgment and thus timely, pursuant to 28 U.S.C. § 1257 and 28 U.S.C. § 2101(c) and Rule 10(1)(c) of the Rules of Court for the U.S. Supreme Court.

NO. _____

SUPREME COURT OF THE UNITED STATES

_____ TERM, 2004

JOHN MACLACHLAN; JAMES BROWN; STEPHEN K. MANLEY; ALAINA SPURLOCK; BERND STAHR; MICHAEL ZAIONTZ, on behalf of themselves and all others similarly situated,

PETITIONERS

v.

EXXON MOBIL CORP., [Successor by Merger to Mobil Corporation], as Trustee Administrator and Fiduciary of Retirement, Savings, Severance, Separation, Insurance, and other miscellaneous employee benefits/Welfare Plan of Mobil Corporation; THOMAS C. HARRISON, as Assistant Administrator Benefits of Benefits of Exxon Mobil Corporation, Retirement, Savings, Severance, Separation, Insurance, and other miscellaneous benefits plans of Exxon Mobil Corporation; RETIREMENT PLAN, also known as Mobil Retirement Plan; COMPREHENSIVE MEDICAL PLAN, also known as Mobil Medical Plan; DENTAL ASSISTANCE PROVISIONS, also known as Mobil Dental Plan; DEPENDENT GROUP LIFE INSURANCE PLAN, also known as Mobil Group Life Insurance Plan; DISABILITY INCOME PLAN; EMPLOYEE STOCK OWNERSHIP PLAN, also known as Mobil Stock Plan; EMPLOYEE SAVINGS PLAN, also known as Mobil Savings Plan; LIFE INSURANCE PLAN, also know as

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RESPONDENTS

CIVIL APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, John Maclachlan, James Brown, Stephen K. Manley, Alaina Spurlock, Bernd Stahr, Michael Zaiontz, on behalf of themselves and all other similarly situated, respectfully pray that a Writ of Certiorari be granted to review the decision of the United States District Court for the Eastern District of Louisiana granting Motion for Summary Judgment in favor of the respondents, denying petitioners' timely filed Motion to Alter and Amend Judgment and the affirmation of same by the United States Court of Appeals for the Fifth Circuit entered in the above-titled proceeding on November 20, 2003.

I. Statement of the Case

It is undisputed by the parties that the petitioners were common law employees of Mobil, who were not expressly excluded from Mobil's ERISA benefit plan until 1994 plan amendments. Shortly before or, with the merging of Exxon and Mobil in December 1999, the employment of the petitioners was terminated. Subsequently, requested ERISA governed benefits were denied the petitioners on the basis that they were not "payroll employees" of Mobil, despite the plan being void of any such condition for qualification for benefits.

The petitioners were long-term full time employees with Mobil, pursuant to common-law standards, but were classified as "non-employees" of Mobil under labels that denied them benefits and rights. Several of the class plaintiffs were employed by more than one different payroll employer during their tenure with Mobil, with their employment being transferred or "rolled over" from one payroll employer to another. John MacLachlan, named petitioner, filed an ERISA administrative claim for benefits owed under the Mobil's ERISA plans upon his discharge from Mobil. Maclachlan's claim was referred to Mobil's plan administrator.

In March 2000, the time of Maclachlan's denial of approval for benefits, Thomas C. Harrison was assistant administrator of benefits, who had been delegated fiduciary duty to respond to benefits appeals arising under Mobil's benefit plans.[1] Prior to the merger of Exxon and Mobil, Harrison was an employee of Exxon and unfamiliar with Mobil benefit documents. Maclachlan's was the first benefits appeal Harrison handled arising from the Mobil benefit plans, and provided Harrison with the first opportunity to review Mobil's plans. Despite having sole fiduciary responsibility with regard to the denial of Maclachlan's benefits claims, and his lack of familiarity with the plans at the time he denied Maclachlan's appeal, Harrison failed to review Mobil administrative manuals; failed to obtain an understanding of the issues relevant to the status of common law employees as raised in Maclachlan's appeal; and relied solely on one individual, Douglas Davies, for an interpretation

[1] In March 200, the merger between Exxon and Mobil had been completed, with successor company identified as Exxon Mobil. Maclachlan's claim arose under the benefit plans administered by Mobil prior to the merger.

of the plan, although Davies had no fiduciary duty arising under the administration of the plan.

To demonstrate that Harrison abused his discretion in failing to apply a uniform interpretation of eligibility under Mobil's ERISA plans, the petitioners produced demonstrative evidence obtained after the Administrative Record was closed and litigation initiated. The Petitioners presented two memorandums, one dated June 23, 1989 written by F.K. Joyner, Jr. from the Office of General Counsel of Mobil, and the second dated May 1, 1990 also from the Office of General Counsel of Mobil authored by W.C. Whittemore. These legal opinions amount to an historical legal interpretation of "employee" by the company agency charged with this responsibility. (Both the Retirement Plan of Mobil Oil Corporation and the Savings Plan of Mobil Oil Corporation charge the Office of General Counsel with primary authority to legally interpret the plans).

Summarizing the memorandums, the company had adopted the "20 Factor" Common Law Test enumerated in Internal Revenue Service Ruling 87-41 as determinative of "regular employee" status under the benefit plan, which was thoroughly discussed in the June 23, 1989 memo outlined by F.K. Joyner of the Office of General Counsel. In fact, the memo concludes that "If an independent contractor were determined to be an employee, then Mobil would be liable to the IRS for the payment of employment taxes (FICA, FUSA and income tax withholdings)...". Theses taxes represent W-2 payroll tax withholdings, which are the sole criteria the plan administrators apply in determining plan eligibility.

The significance of this memo, issued by the Office of General Counsel, is that it concluded contrary to the plan interpretation of Harrison that the definition of an employee is governed by federal employment tax regulation, not by

the issuance and receipt of a Mobil paycheck unilaterally and arbitrarily determined by Mobil. The 1990 memo incorporating the 1989 legal opinion, was issued by W.C. Whittemore apparently in response to discussions regarding concerns involving the use of employees and independent contractors on a third party payroll together at the Mobil aviation facility at which named petitioners Manley, Spurlock, and Brown were employed.[2]

Finally, the plans call for interpretation of plan application to be made by the Office of General Counsel, who in the present case advised that exclusion of such employees could be inviolate of ERISA protected rights. Neither Harrison nor Davies contacted the Office of General Counsel to inquire about historical legal interpretations under the Plans for participation eligibility issues involving the Petitioners. In order to comply with ERISA provisions, the Office of General Counsel advised that the relationship between Mobil and payroll employees would have to berevised to a true independent contractor status, with the full autonomy afforded such status, or the employees be formally retained by Mobil as employees. No such dialogue would have been necessary, if in deed the Mobil policy of excluding non-payroll employees from benefits was uniformly accepted and applied. The memorandums evidence that until 1994, Mobil executives considered non-payroll workers as potentially being eligible for Mobil benefits as common law employees.

Before Harrison responded to Maclachlan's initial claim, the petitioner unsuccessfully attempted to engage

[2] The District Court failed to recognized this significance in holding that the memoranda, "do not represent an interpretation of the administration of any Mobil plan or a decision concerning the eligibility of any Mobil benefit claimant."

meaningful dialogue with the administrator about his claim and to retrieve pertinent information, including copy of the plans themselves upon request.[3] On February 24, 1999, Mobil initially denied Maclachlan's request for benefits but failed to provide any additional material necessary to perfect the claim or numerate the steps that must be taken to appeal the denial. Finally, Mobil denied Maclachlan's appeal in March 2000 because he was not an employee on Mobil's payroll. Maclachlan's claim was denied after the plan administrator reviewed the plan documents and plan description summaries, in effect at the time of Maclachlan's hire, and the Benefits Communication System, the benefits administrative manual. Maclachlan had not signed any agreements with Mobil excluding his participation in the Mobil benefit plans.

Harrison's denial of Maclachlan's benefits contradictsthe plain language of the plan and Mobil asserts that Maclachlan's claim was denied because he did not receive a paycheck from Mobil. Yet, it is undisputed that no Mobil plan contains the term "paycheck", much less the provision requiring a worker to be on Mobil's payroll. In addition, Harrison acknowledged that, not until 1994 were the Mobil ERISA plans amended to expressly exclude "common law" employees, despite Mobil's awareness of the misclassification of common law employees as non-regular Mobil employees.[4] Despite his awareness of the clear distinction

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[3] The "Administrative Record" in this matter consists of the material reviewed by the administrator in denying maclachlan's claim including, drafts of letters authorized by Doug Davies, the plan documents in effect at the time of Maclachlan's hire; the relevant summary plans descriptions and the administrative guide, Benefits Communication System.

[4] Petitioners do not concede that as of the 1994 amendment the terms of the benefits plans no longer inured to them do to their status as common

made in the plan documents following the 1994 amendment, Harrison failed to discharge his duties with the care, skill, prudence and diligence that a reasonable fiduciary would use under the circumstances in denying Maclachlan's claim. 29 U.S.C. §1104(a)(1). Harrison also failed to administer the plans solely for the benefit and in the interests of Maclachlan and those similarly situated, the beneficiaries. *Id.*

On July 25, 2000, a Class Action Complaint was filed by John Maclachlan, James Brown, Stephen K. Manley, Alaina Spurlock, Bernd Stahr and Michael Zaiontz, individually and on behalf of those individuals similarly situated, against Exxon Mobil Corporation and its fiduciaries and its benefit plans for employment and retirement benefits during their employment and post-employment with Mobil Oil Corporation, predecessor to Exxon Mobil Corporation. Petitioners amended the Complaint on March 1, 2001.

Pursuant to Motion to Dismiss filed by defendants, District Court issued an Order and Reasons on September 24, 2001, denying defendants' Motion to Dismiss Petitioners' Original and First Amended Complaints in part, and granting defendants' Motion to Dismiss Petitioners' Original and First Amended Complaints in part. As a result, the case proceeded based on ERISA §502(a)(1)(B) contract and statutorybased causes of action afforded to participants and beneficiaries to recover benefits, enforce rights, clarify future benefit rights under the terms of employment

(footnote 4 continued)
law employees. In fact, petitioner's assert that Mobil improperly amended the plan by failing to provide the petitioners notice of such amendment and modifications which affected their benefits. *See, Seaman v. Arvita Realty Subs.*, 985 F.2d 543 (11th Cir. 1993), *cert. denied*, 1145 S.Ct. 308 (1993). Further, as argued herein, petitioners urge that common law employees cannot be a class of individuals against who plan administrators can discriminate.

benefits plans of Mobil Oil Corporation.

On May 7, 2002, Defendants filed a Motion for Summary Judgment and Petitioners filed a Partial Motion for Summary Judgment based upon liability issues only.[5] After substantial briefing and oral argument the District Court granted defendants' Motion for Summary Judgment and dismissed Petitioners' Partial Motion for Summary Judgment. In granting defendants' Motion for Summary Judgment, the District Court failed to consider evidence presented by the Petitioners of the Plan Administrator's abuse of discretion and misapplied the law, governing review of the Plan Administrator's denial of benefits. As such, on October 2, 2002, Petitioners filed a Motion to Alter and Amend Order and Reasons issued by district court on September 18, 2002.

On December 5, 2002, erroneously interpreting thePetitioners' evidence, the District Court denied Petitioners' timely filed Motion to Alter and Amend Order and Reasons. Petitioners timely filed Notice of Appeal to United States Fifth Circuit Court of Appeals on December 16, 2002. The Fifth Circuit Court of Appeals affirmed the lower court's decision on November 20, 2003.

II. Standard for Review

The standard-of-review inquiry is more involved in ERISA cases than in most. The Supreme Court has mandated that courts review under the arbitrary and capricious standard claim denials in ERISA cases if "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms

[5] Motion by Plaintiffs for Class Certification filed on May 7, 2002, simultaneous with Motion for Partial Summary Judgment, was later rendered moot as a result of the District Court granting defendants' motion for Summary Judgment.

of the plan." *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). "Under the arbitrary and capricious standard, an administrator's decision will only be overturned if it is without reason, unsupported by substantial evidence or erroneous as a matter of law [and] the court is not free to substitute its own judgment for that of the defendants in determining eligibility for plan benefits." *Pinto v. Reliance Standard Life Ins. Co.,* 214 F.3d 377, 387 (3rd Cir. 2000).

Here both parties agree that the Policy grants Exxon Mobil such authority with the caveat, that Petitioners contend such judgment is subject to, and qualified by the Office of General Council's authority to legally interpret the plans.

However, if the same entity that determines whether a claimant is entitled to benefits must also pay for those benefits, that entity has a financial incentive to find against the beneficiary. This Court recognized that "...if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed in determining abuse of discretion. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

In Pinto, the Court employed a "sliding scale" approach in which, the level of scrutiny applied to the fiduciary's decision, was described as "a range, not a point." *Id.* at 392 (quoting *Wildbur v. ARCO Chem. Co.*, 974 F.2d 631, 638 (5th Cir. 1992)). The level of scrutiny is "more penetrating the greater is the suspicion of partiality, less penetrating the smaller the suspicion is." Id. at 392-93. *See also, Jung v. FMC Corp.*, 755 F.2d 708, 711-12 (9th Cir. 1985) (where "the employer's denial of benefits to a class avoids a very considerable [financial] outlay...the reviewing court should consider that fact in applying the arbitrary and capricious standard of review" and "less deference should be given to the trustee's decision.")

In the present case, Exxon had substantial incentive to deny benefits to the proposed class to avoid financial exposure to the now merged Exxon Mobil ERISA-governed plans. The circumstances leading to the denial of Petitioners' benefits further illuminates the need for heightened scrutiny than that applied by the Fifth Circuit Court of Appeals in reviewing the determination of the plan administrator to define, an otherwise ambiguous plan term, to the exclusion of the Petitioners, *post hoc*.

III. Reason for Granting the Petition

The Fifth Circuit of Appeals in holding that, "the remedy for an ambiguity in a plan's language is not the compelled inclusion of all employees who fit within the scope under federal common law, but rather, the exercise of interpretive discretion by a duly empowered administrator," is in conflict with the Third Circuit Court of Appeals and Ninth Circuit Court of Appeals that have held when an ERISA plan document is ambiguous it is an abuse of a plan administrator's discretion to fail to apply federal common law to fill this gap. See, *Lasser v. Reliance Standard Life Insurance Co.*, 344 F.3d 381 (3rd Cir. 2003) (unreasonable for a plan administrator to ignore established federal statutory or case law in defining post hoc a plan term); and *Schikore v. BankAmerica Supplemental Retirement Plan*, 269 F.3d 956 (9th Cir. 2001) (unreasonable for a plan administrator not to apply common law principle in plan interpretation when evaluating claims for benefits unless that common law is inconsistent with ERISA's objectives).

Further, the Fifth Circuit Court of Appeals decision is in apparent conflict with the principles set forth by this Honorable Court in *Nationwide Mutual Ins. Co v. Darden*, and its progeny, in which the Court applied common law

principles to the circular definition of "employee" found in ERISA and which the same circular definition existed in the Mobil plans at issue.[6]

IV. Development of Common Law in Interpretation of ERISA

Congress passed ERISA in 1974 to establish a comprehensive federal scheme for the protection of the participants and beneficiaries of employee benefit plans. See, 29 U.S.C. §1001; *see also, Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). In enacting ERISA, Congress painted with a broad brush expecting the federal courts to develop federal common law rights and obligations interpreting ERISA's fiduciary standards. *Bin v. Exxon Company*, USA, 220 F.3d 1042, 1047 (9th Cir. 2000) (en banc) quoting *Varity Corp. v. Howe,* 516 U.S. 489, 487 (1996); *Sec. Life Ins. Co. of Am. v. Meyling*, 146 F.3d 1184, 1191 (9th Cir. 1998) (under ERISA, Congress has authorized the courts to formulate a nationally uniform federal common law to supplement the explicit provision and general policies set out in the Act). In formulating the federal common law applicable to ERISA, courts are to be governed by the federal policies at issue. *Menhorn v. Firestone Tire and Rubber Co.*, 738 F.2d 1496, 1500 (9th Cir. 1984). The plain language of an ERISA should be given its literal and natural meaning. *Healthcost Controls v. Isbell*, 139 F.3d 1070, 1072 (6th Cir. 1997).

Nothing in ERISA requires employers to establish employee benefit plans, nor does ERISA mandate what kind of benefits employers must provide if they chose such

[6] The First Circuit Court reached the same erroneous finding that when a plan has a circular definition of employee, the plan administrator has the discretion to interpret the plan even if it is contrary to common law. *Kolling v. American power Conversion Corp.*, 347 F.3d 11, 14(1st Cir. 2003).

a plan.ERISA does, however, seek to ensure that employees will not be left empty-handed after employers have guaranteed them certain benefits. *Lockheed Corp. v. Spink,* 517 U.S. 882, 887 (1996). ERISA mandates that "every employee benefit plan shall be established and maintained pursuant to a written instrument," 29 U.S.C. § 1002(a)(1), and that plan administrators provide benefits "in accordance with the documents and instruments governing the plan," 29 U.S.C. §1104(a)(1)(D). "A written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." *Curtiss-Wright, Corp. v. Schoonejargen*, 514 U.S. 73, 83 (1995). A primary purpose of ERISA is to ensure the integrity and primacy of the written plans. *Dugan v. Hobbs*, 99 F.3d 307, 309-10 (9th Cir. 1996); *Van Orman v. American Ins. Co.*, 680 F.2d 301, 312 (3rd Cir. 1982). Consequently, courts have held that the imposition of new conditions that do not appear on the face of the plan, constitute arbitrary and capricious conduct. *Garrett v. Walker*, 164 F.3d 129, 1255 (10th Cir. 1998).

Federal courts may not apply common law theories to alter expressed terms of written benefit plans. *Bollman Hat Co. v. Root,* 112 F.3d 113, 116 (3rd Cir. 1997); *Cinelli v. Security Pacific Corp.*, 61 F.3d 1437, 1444-45 (9th Cir. 1995); *Parker v. BankAmerica Corp.*, 50 F.3d 575, 769 (9th Cir. 1995). In a situation where the statute does not provide explicit instructions, however, it is well settled that congress intended that the federal courts would fill in the gaps by developing common light of reason, common experience, common sense, a federal common law of rights and obligations imposed by the statute. *See, e.g. Varity Corp. v. Howe,* 516 U.S. 489, 487 (1996); *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989). The central purpose of

ERISA is to "protect the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b) (Congressional findings and declaration of policy) *See also, Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983).

As stated, Courts have authority, and have exercised this authority, to develop a body of federal common laws to govern issues in ERISA actions not covered by the act itself. To decide whether a particular rule should become part of ERISA's common law, courts must examine whether the rule serves to further ERISA's scheme and goals. *Nachwalter v. Christie,* 805 F.2d 956, 960 (11th Cir. 1986). ERISA has two central goals: (1) protection of the interests of employees and their beneficiaries in employee benefit plans; and (2) uniformity in the administration of employee benefit plans. *See, Id.; and Smith v. Jefferson Pilot Life Ins. Co.,* 14 F.3d 562, 570-71 (11th Cir. 1994). It is against this backdrop of well-established jurisprudence that a Court must examine a plan administrator's interpretation of an ambiguous or undefined term in determining whether the plan administrator abused his discretion in denying a claim.

V. Application of Common Law by Plan Administrators

A conflict exists in the Court of Appeals as to the proper approach a plan administrator must take when interpreting an ambiguous or undefined plan term. While the degree of discretion granted by a plan to the plan administrator will vary, the Court of Appeals are at odds as to whether a plan administrator abuses his discretion, regardless of the degree of deference granted, in adopting an interpretation of a plan term that is contrary to common law.

In *Schikore*, the Ninth Circuit found that the plan administrator's failure to apply the common law mailbox rule to interpret the term "received", which was not other-

wise defined in the plan, was an abuse of discretion. 269 F.3d at 961-62. Noting that federal common law is applicable in evaluating claims for benefits, unless such application is inconsistent with ERISA's objectives, the Court reasoned that the common law mailbox rule was consistent with the purposes of ERISA and applied to ERISA plans where receipt of a document for benefit qualification is a factual issue in dispute. *Id.* at 962. In support of this holding, the Court cited its decision in *Sec. Life Ins Co. of Am. v. Meyling*, 146 F.3d 1184, 1191 (9th Cir. 1998), that there is a common law right of rescission under ERISA for an insurance contract entered into under a false representation of health; and the Eleventh Circuit's holding in *Horton v. Reliance Standard Life Ins. Co.*, 141 F.3d 1038 (11th Cir. 1998), that federal common law presumptions against suicide and in favor of accidental death applied to ERISA benefit plans.

The panel in *Schikore* goes to great length to distinguish its holding from that of the Ninth Circuit panel in *Hensley v. NorthwesternPermanente P.C. Ret. Plan & Trust,* 258 F.3d 986 (9th Cir. 2001) which held a plan administrator need not apply a common law definition of a plan term. 269 F.3d at 962 n. 3. Yet, the exercise was superfluous and evident of the lack of uniform application of federal common law of rights and obligations imposed by ERISA, where explicit instructions for plan administration are not provided by the Act. In *Hensley*, the Court recognized that the plan administrator did not abuse his discretion in applying a "W-2" definition to the otherwise circular defined term"qualified employee", because, in part, the plan administrator considered the *Darden* factors in determining that the individuals at issue were not common law employees. 258 F.3d 986, 1002 (9th Cir. 2001).

Circuit Judge Rawlinson authored a concurring opinion in *Hensley* to clarify that the majority over-reached in addressing the issue of a plan administrator's discretion to independently define a plan term, regardless of common law implications, because the plan administrator did in fact consider the common law factors in interpreting the term "employee." *Id.* at 1003. Congruent with Rawlinson's concurring opinion, is the holding of the Seventh Circuit Court of Appeals in *Trombetta v. Cragin Federal Bank for Savings Employee Stock Ownership Plan, et al*, 102 F.3d 1435 (7th Cir. 1997). The *Trombetta* Court noted that the plan administrative committee carefully considered and rejected the plaintiff's evidence of common law employee status as set forth in *Darden* in interpreting the plan term "employee" in ruling that no abuse of discretion occurred. *Id.* at 1439.

The Third Circuit has also adopted the deference to federal common law jurisprudence approach as set forth in its holding in *Lasser v. Reliance Standard Life Insurance Co.*, 344 F. 3d 381 (3rd Cir. 2003). The Court found the plan administrator abused his discretion in defining the plan term "regular occupation" contrary to that found in the case law pertaining to disability policies containing the "regular occupation" modifier. *Id.* at 386. The Court reasoned that the plain meaning of "regular occupation" was established by jurisprudence and was one of which both parties to the dispute were aware. *Id.* Thus, it was an abuse of discretion for Reliance to attempt to deviate from this definition *post hoc*, as it had the opportunity to "opt out" of this plainly understood term by amending the plan terms. *Id.*

In support of its rational, the Third Circuit turned to its prior holdings in *Gaines v. Amalgamated Ins. Fund*, 753 F.2d 288, 290 n. 5 (3rd Cir. 1985), wherein the Court deferred to a plan administrator's construction of an ERISA-governed insurance policy when there was no case

law interpreting the provision at issue; and in *Epright v. Environmental Res. Mgt. Inc. Health & Welfare Plan*, 81 F.3d 335, 340 (3rd Cir. 1996), which Court held that a plan construction was unreasonable and an abuse of administrative discretion when the administrator could not support his interpretation by statutory provision and the definition utilized by the administrator appeared self-serving. Thus, the Third Circuit has consistently adopted the proposition that a plan administrator abuses his discretion when he interprets plan terms contrary to established federal common law. *See also, Phillips v. Lincoln National Ins. Co.*, 978 F.2d 302 (7th Cir. 1993) (application of federal common law rules of contract interpretation was proper to find a plan administrator abused his discretion in interpreting an ambiguous term in an insurance policy); *Morton v. Smith*, 91 F.3d 867 (7th Cir. 1996) (no abuse of discretion when the plan administrators interpretation of a plan term is supported by well established legal concepts.)

The Third and Ninth Circuit finding of abuse of discretion by a plan administrator who does not apply federal common law in defining ambiguous or undefined plan terms is in direct conflict with the Fifth and First Circuit Court of Appeals' holdings that a plan administrator has unfettered discretion to interpret plan terms, even if contrary to federal common law, if the plan bestows such discretion. The Fifth Circuit Court of Appeals, in the present case, ruled that the remedy for an ambiguity in a plan's language is not the compelled inclusion of all employees who fit within the scope of the term under the federal common law, but rather, the exercise of interpretative discretion by a duly empowered admin-istrator. 350 F.3d at 482. The term to be interpreted by the plan administrator was "regular employee" and despite the fact that it is undisputed that the individual petitioners were common law employees, as con-

templated by *Darden*, the Court ruled that the plan administrator has unfettered discretion, when such discretion is bestowed by the plan, to define plan terms regardless of the dictates of federal common law.

A review of the opinions the Circuit Court of Appeals demonstrates that no clear methodology is followed when a Court is confronted with determining whether a plan administrator abused his discretion in interpreting an ambiguous or defined plan term and failed to apply federal common law. For example, the Sixth Circuit, when faced with deciding the reasonableness of a plan administrator's interpretation of an undefined term, turned to federal common law, to hold that when a plan bestows discretion on a plan administrator there is no further review of abuse of discretion necessary by the judiciary. *Admin. Comm. of Sea Ray Employees' Stock Ownership and Profit Sharing Plan v. Robinson*, 164 F.3d 981 (6th Cir. 1999). The Third Circuit in *Lasser* and Ninth Circuit in *Schikore* have held that, even if discretion is bestowed on the plan administrator, it is an abuse of discretion if he does not apply federal common law in interpreting ambiguous plan terms, regardless of the breath of discretion bestowed by the plan.

In conflict with these holding, the First Circuit in *Kolling v. American Power Conversion Corp.,* ruled, that, while the plaintiff made a plausible argument that he was a common law employee, the plan granted the plan administrator discretion to determine the meaning of the plan term "employee", where a circular definition existed, regardless of common law application set forth in *Darden*. 347 F.3d 11, 14 (1st Cir. 2003). The First Circuit pronounced that, "[w]ithin limits, ERISA affords employers broad discretion to limit participation in their employee benefit plans-even where such exclusion affects common law employee." *Id.* (citing *Wolf v. Coca-Cola Co.*, 200 F.3d 1337, 1340 (11th

Cir. 2000) (which stands for the premise that companies are not obligated by ERISA to make ERISA plan benefits available to all common law employees who are otherwise expressly excluded under a different provision).

Within these decisions the Fifth Circuit and the First Circuit have failed to evaluate the principle that in defining an ambiguous plan term, the plan administrator cannot impose new conditions on plan beneficiaries that do not appear on the face of the plan. See, *Cirulis v. UNUM Corp.*, 321 F.3d 1010 (10th Cir. 2003). As noted by the Tenth Circuit, an imposition of a rule that allows a plan administrator such broad discretion to condition plan benefits on terms that do not appear on the face of the plan would defeat the express purpose of ERISA. *Id.* at 1015. Both the Fifth Circuit, in the present case, and the First Circuit in *Kolling*, found reasonable and not an abuse of discretion a plan administrator's interpretation of an undefined plan term which imposed a company "payroll" requirement for eligibility in the ERISA-governed plans, which requirement was not expressly set forth in the plan documents.

Taking the Fifth Circuit and First Circuit rational to its logical conclusion would extinguish all judicial review of denials. Such an interpretation would negate the contractual nature of ERISA plans and allow the plan administrator to rarely, if ever, commit, an abuse of discretion, in interpreting undefined plan terms, even if contrary to federal common law. *See*, *Cozzie v. Metropolitan Life Ins. Co.*, 140 F.3d 1104 (7th Cir. 1998). Such broad discretion is not in keeping with the purpose of ERISA to "protect the interests of participants in employee benefit plans and their beneficiaries" 29 U.S.C. § 1001 (b) (congressional findings and declaration of ERISA policy); and uniformity in the administration of employee benefit plans. *Smith v. Jefferson Pilot*

Life Ins. Co., 14 F. 3d 562, 570-71 (11th Cir. 1994).

Allowing the plan administrator to clarify, within his discretion, the plan term "employee", which had a circular definition in the plan documents, to include a requirement not present on the face of the plan document and contrary to federal common law, is not only in conflict with fellow Circuit Courts' rational and approach, but is also in conflict with this Court's dictates in *Darden*, which established the eligibility of individuals to enforce ERISA and participate in ERISA-governed plans. As this Court stated in *Varity*, common law provides legal meaning to words which are not self-defining. 516 U.S. 502 (1996) (citing *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 322 (1992). In condoning administrative interpretation, which is void of federal common law consideration, the Fifth and First Circuit Courts of Appeal are in apparent conflict with the dictates of this Court.

VI. The Common Law Definition of Employee

First it must be reiterated that Exxon Mobil stipulated that Petitioners were all common law employees of Mobil during the term of their employment. How then does this stipulation and admission affect an analysis of the lower court rulings, or in a larger context, the ability of an employer or plan administrator operating within an ERISA framework to discriminate against common law employees?

The U.S. Supreme Court has made it clear in *Darden,*, that the common law test of traditional agency law applies in defining an "employee" under ERISA with respect to an employer plan sponsor. 503 U.S. 318 (1990).

The holding in the *Darden* in summary is as follows:

> "ERISA's nominal definition of 'employee' as 'any individual employed by an employer,' 29 U.S.C. § 1002(6), is completely circular and explains nothing.

> As for the rest of the Act, Darden does not cite, and we do not find, any provision either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. Thus, we adopt a common-law test for determining who qualifies as an 'employee' under ERISA." *Id.*

Applying the Supreme Court rational and holding of *Darden*, coupled with Respondent's stipulation that Petitioners are common-law employees of Mobil, it is a foregone conclusion that the ERISA ramifications of employment flow from this relationship. In the context of *Darden*, the Petitioners are in fact "individual (s) employed by an employer" as set forth in 29 U.S.C. § 1002(6). Further, extrapolated from this analysis then is the sources of employment. As Mobil has admitted Petitioners were common-law employees of Mobil, the sequitur is Petitioners are employed by an employer, which is Mobil Oil Corporation.
Mobil effectively admits this fact.

The final step in this analysis is to apply this employment status to the actual Mobil Oil Corporation retirement plan, in effect at the time of Petitioners' hire, and for that matter all definitions in later drafts. The 1986 retirement plan reads:

> "'Regular employee' shall mean an individual who has not attained the retirement date specified in Section 1 of Article IV who is employed by an employer-corporation for work prior to January 1, 1976 on a regular schedule of at least 20 hours per week for an indefi-nite period and, after December 31, 1975, for a regular period if at least 1,000 <u>hours of employment</u> per calendar year, or who actually

> completes 1,000 hours of employment during the 12 months following his date of hire."

The Mobil Oil Corporation Savings Plan in effect at May 1987 reads,

> "'Regular employee' shall mean an individual who is employed by an employer-corporation for work princi-pally in one of the States of the United States or the District of Columbia on a regular schedule of at least 20 hours per week for an indefinite period and, after December 31, 1975, on a regular schedule of at least 1000 hours of employment per calendar year or who actually completes 1000 hours of employment during the twelve months following his or her date of hire..."

Since Mobil admits the Petitioners are their common law employees, and since *Darden* holds that common law employees are "employed by the employer", then these plan provisions properly applied to Petitioners status, define them as "regular employees" of Mobil Oil Corporation, and in turn eligible for all retirement plan benefits of the company.

In sum, common law employees are employed by their common law employer, and under Mobil plans individuals employed by an employer-corporation are "regular employees" of Mobil, as defined in their plan. The Fifth Circuit's failure to address these fundamental factual issues, which give rise to "benefit eligible" employee status of Petitioners, is in apparent conflict with this Court's holding in *Darden,* and its progeny.

While the U.S. Supreme Court has enunciated in *Darden* this standard for ERISA cases with Darden, the Court has recently extended this same holding to other federal laws which lack definitions of "employers" and "employees" within the context of their statutes. In concluding that the common law of agency analysis applies to the American with Disabilities Act of 1990, the Supreme

Court in *Clackamas Gastroenterology Assocs., P.C. v. Wells,* reconfirmed the *Darden* analysis stating,

> "We have often been asked to construe the meaning of 'employee' where the statute containing the term does not helpfully define it." *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 322, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992). The definition of the term in the ADA simply states that an "employee" is an "individual employed by an employer." 42 U.S.C. § 12111(4). That surely qualifies as mere "nominal definition" that is "completely circular and explains nothing." *Darden*, 503 U.S., at 323, 112 S.Ct. 1344. As we explained in *Darden*, our cases construing similar language give us guidance on how best to fill the gap in the statutory text." 123 S.Ct. 1673, 1677 (2003).

And again, the *Darden* analysis was adopted in litigation involving the Age Discrimination Employment Act applying common law factors as follows:

> "The same problem of the tyranny of labels arose when the Supreme Court had to draw the line in ERISA between and 'employee,' defined unhelpfully as in the ADEA as 'any individual employed by an employer,' 29 U.S.C. § 1002(6), and an independent contractor. The Court could have said that an employee is anyone who is called an employee. Instead it [defered to]...
>
> > "General common law of agency" and noted, "Since the common-law test contains no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *EEOC v. Sidley Austin Brown & Wood,* 315 F.3d 696 (7th Cir. 2002).

In 1989 the U.S. Supreme Court applied the common law of agency rule to the Copyright Act of 1976 in the case

of *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) holding:

> "'Where Congress used terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms...In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master servant relationship as understood by common-law agency doctrine.'"

The Internal Revenue Service Department of the Treasury Promulgated Revenue Ruling 87-41 which is a 20-factor common law agency test that is uses to determine which person is an employee or an independent contractor for federal tax withholding and FICA contributions under the Internal Revenue Laws. The Ninth Circuit in *Vizcaino v. Microsoft Corporation* thoroughly explores the consequences of the misclassification, evolution, and maturity of common law employees. 120 F. 3rd 1006 (9th Cir. 1997). *Vizcaino* succinctly states:

> "the IRS made its determination based upon the list of factor which is generally used to decide whether a person is an independent contractor or an employee. See 26 C.F.R. § 31.3401(c)-1(b). The same essential definition is used for § 401(k) plans see 26 C.F.R. § 1.410(b)-9, and for § 423 plans, see 26 C.F.R. §§ 1.423-2(e)(2), 1.421-7(h). That there should be a congruence of approaches is not surprising. As the Supreme Court has pointed out, when Congress uses the word 'employee,' courts ''must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning" of that word. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322, 112 S.Ct. 1344, 1348, 117 L.Ed.2d 581 (1992).

> The Court then went on to scrutinize the various typical factors that go into a determination of whether a person is an employee. *See Id.* at 323-24, 112 D.Ct. at 1348-49. Those were the usual common law factors. But, again, we recognize that one could still question the IRS's application of those factors in a particular case.
>
> That question is obviated here for, perhaps more to the purpose, both Microsoft and the SPP have conceded for purposes of this appeal that the Workers were common law employees. In fact, they have asserted that the Workers' status is a 'nonissue' because they concede that the Workers were common law employees. That is to say, they were employees of Microsoft." *Id.*

Vizcaino's holding is that a common law employee is an employee of the common law employer and renders as moot arguments categorizing the relationship as otherwise-inclusive of agreements between the parties themselves. The holding of *Vizcaino* mandated the eligibility and inclusion of workers formerly categorized as independent contractors to be participants in Microsoft's Stock Purchase Plan (SPP as referred to in the court's holding).

At this time it should be noted that the Fifth Circuit Court of Appeals' ruling makes no mention of *Darden* despite the stipulation of common law status of the Petitioners, and despite an extensive briefing of the *Darden* application to the present case. In ignoring this jurisprudence and failing to address its implications for the Petitioners, the Fifth Circuit Court of Appeals is in apparent conflict with this Court's dictates as stated in *Darden* and its progeny of case law.

VII. Can common law employees of an employer be permissibly excluded from a retirement plan governed by ERISA?

The U.S. Circuit Courts of Appeals have struggled with the principle of excluding common law employees from ERISA plan participation. Unfortunately, the Court's have focused on the concept of broad employer power to draft plans and exclude common law employees in the context of dicta, while the actual case holdings revolve around other more specific exclusions rooted in contract, tax law, or lack of proof of common law status at the administrative or district court level. The case of *Bauer v. Summit Bank Corp.,* 325 F.3d 155 (3rd Cir. 2003) explores an array of cases within the federal circuits, all of which were decided based upon plan language specifically excluding participation of common law employees based on status other than that of common law. The *Bauer*, analysis requires a worker to meet a common law test citing *Darden* for the worker to have a colorable ERISA claims under ERISA age and service requirements. Once the Darden standard is met, the second prong of the *Bauer* test is to look to the plan language, not defer to an administrator's decision, as to whether the worker is specifically excluded under the terms of the ERISA plan itself.

In the present case, the Petitioners would pass both tests of *Bauer* by virtue of common law status and lack of applicable exclusion to their participation in the Mobil plans. In fact, the *Bauer* rationale would seem to contradict any assertion that common law employees could legitimately be excluded from a plan since it is part of an "inclusive" analysis for plan participation under ERISA.

This case differs from the others given the lack of any express plan exclusion applicable to Petitioners and, as

such, is a case of first expression for the Supreme Court. As acknowledged in the Fifth Circuit's holding for the Petitioners' plan years of service prior to 1995, "the definitions in the plan make no mention of payroll status as a defining criteria, nor of an exclusion of non-payroll employees from the plan." *MacLachlan*, 350 F.3d at 476. It was not until 1994, however, that the plans were amended specifically excluding "employee(s) of an Employer" under common law principals. While the Fifth Circuit discusses a variety of inapplicable exclusions to Petitioner's claim for benefits it ultimately relents to the lack of any contractual basis for excluding Petitioners as plan participants, stating:

> "To be sure, plaintiffs' reading of the Mobil plan is at least plausible in that before the 1994 amendment, the plan did not specifically exclude common law employees. But the plan does not explicitly include such employees, either. The remedy for such an ambiguity in a plan's language is not the compelled inclusion of all employees who arguably fit within its scope, but rather, the exercise of interpretive discretion by a duly empowered administrator. Harrison's deci-sion that third-party contractors are not included in the plan was not an abuse of that discretion." 350 F.3d at 482.

So then, in light of ERISA and *Darden*, absent any such specific plan exclusions, can an administrator retroactively exclude common law employees in the absence of such a plan exclusion (pre-1995 plan years), or is it permissible for common law employees to the excluded by virtue of a contractual retirement plan exclusion (post 1994 plan years)? It has long been held that under ERISA classes of employees may be excluded from covered plans. "ERISA does not mandate that employers provide any particular

benefits, and does not itself proscribe discrimination in the provision of employee benefits." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, (1983). *Bronk v. Mountain States Telephone and Telegraph, Inc.*, addresses the holding in Shaw from the perspective of plan drafting, stating that, "...ERISA does not prohibit an employer from distinguishing between groups or categories of employees providing benefits for some but not for others." 140 F.3d 1335, 1338 (10th Cir. 1998).

The question presented by Petitioners to this Court is, "Are common law employees a class, group, or category of employment capable of exclusion by plan drafting under ERISA?"

This Court stated in *Firestone Tire and Rubber Co. v. Bruch* 109 S. Ct. 948 that: "ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans, and to protect contractually defined benefits," 489 U.S. 101, 113 (1989) *See also, Massachussetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985). To that end, Congress expected Federal courts would develop a federal common law of rights and obligations under ERISA-regulated plans. *See, Pilot Life Ins. v. Dedeaux* 481 U.S. 41, 56 (1985).

As a policy, does a permissible exclusion of common law employment fulfill the purposes of ERISA to protect employee benefit rights, especially of those who have been misclassified, and left out of the retirement system altogether? A common law exclusion coupled with no other applicable objective standard for exclusion, is a license for an employer to violate the protections of ERISA by negligently or intentionally improperly classifying their workers as non-employees without consequence. This ever increasing practice of "payrolling," whereby an employer main-

tains common law employees on the payroll of a third party company with no further substance to the relationship between the employee and the third party payroll company, has allowed employers to circumvent ERISA.

The true essence of *Darden*, in utilizing the master-servant analysis, is that the term "common law employee" is a description, definition, recognition or identification of an employee, NOT a class or category of employment susceptible to uniform, preconceived discrimination in the business contract sense or context. Common law employee status alone, as highlighted in *Vizcaino*, in pure form, is the recognition that the common law employer should have compensated the workers directly on their payroll, but in fact did not. Such misclassification should not constitute a basis to further detriment worker by avoiding the payment of retirement benefits to him or her, which would have otherwise been rightfully theirs had they been properly classified at the time of commencement of common law employment. A common law employee exclusion under ERISA could operate, in retrospect, as an allowable discriminatory application of plan benefits.

Common law employees are "employees of an employer," which can be potentially found in every imaginable job description. Common law employees are not a homogeneous class of workers capable of being grouped or categorized by statutory or contract rights, job specifications, or conditions of employment, and therefore susceptible to being excluded or being given inferior ERISA benefit rights as a result of a predetermined business employment relationship or a legal regime. In fact, to the contrary, common law employment is usually only identified after a history of behavior has been developed over an extended period of time, and in the ERISA context, a long enough

period of time for a common law employee to vest in benefits of his employer under the age and service provisions of ERISA. The inability of employers to discriminate against common law employees based solely on common law status enforces and strengthens ERISA's intended purposes, by requiring employees to properly classify workers at the outset of theemployment relationship, or as conditions of employment change.

CONCLUSION

Considering the foregoing law and argument, Petitioners urge this Court to grant a Writ of Certiorari reviewing the holding of the Fifth Circuit Court of Appeals, as 1) a conflict exists amongst the federal circuits in adopting an abuse of discretion standard in interpreting the meaning of undefined ERISA plan terms by either applying historical federal common law or allowing a plan administrator to confect their own definitions; 2) the Fifth Circuit Court of Appeals' holding is in apparent conflict with the Supreme

Court holding in Darden in failing to apply the ramifications of common law employment as it pertains to interpretation of the Mobil benefit plans under ERISA with respect to Petitioners; and 3) as a policy, this Court should decide as a first impression whether an ERISA employer can permissibly discriminate against common law employees as a class excluding them from participation in benefit plans.

Respectfully submitted,
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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOHN MACLACHLAN ET AL.	CIVIL ACTION
VERSUS	NO: 00-2190
EXXON MOBIL CORPORATION ET AL.	SECTION: "SO" (4)

filed Sept 18, 2002

ORDER AND REASONS

IT IS HEREBY ORDERED that the Exxon Mobil Corporation defendants' motion for summary judgment is **GRANTED**. (Document #73 .)

IT IS FURTHER ORDERED that the plaintiffs, motion for partial summary judgment is **DENIED**. (Document #71.)

I. BACKGROUND

The facts of this case are found, in this court's "Order and Reasons" of September 24, 2001, and are not repeated here. Succinctly, John MacLachlan, James Brown, Stephen Manley, Alaina Spurlock, Bernd Stahr, and Michael Zainotz allege that they are or were full time employees of Mobil Corporation under the common law, who were classified as non-employees of Mobil under labels that denied them employee benefits and rights. They allege that they were misclassified and/or misdesignated as "non-regular" employees by Mobil and its assistant administrator of benefits, Thomas C. Harrison, in classifications such as

temporary agency employee, payroll service employees, freelancers and/or independent contractors. The plaintiffs were long-term employees of Mobil and worked on Mobil's premises. Mobil provided the plaintiffs with training, equipment, and supplies needed to perform their work for Mobil. The plaintiffs were integrated into Mobil's workforce, worked on Mobil products, and provided services within the core of Mobil's business. They worked side-by-side with other Mobil employees, performing similar or identical work under Mobil's supervision. The services were not highly specialized or individualized.. Consequently, they allege to have been deprived of Mobil employee benefits and privileges to which they would otherwise be entitled under the company's plans, programs, and agreements.

On September 24, 2001, the court denied the defendants, motion to dismiss on grounds that the plaintiffs, other than MacLachlan, failed to exhaust administrative remedies. The court agreed with the remaining plaintiffs, argument that they were excused from exhausting administrative remedies based on futility because MacLachlan's administrative appeal mirrors the allegations of the named plaintiffs. Therefore, the court's review of the administrative record and the administrator's denial of benefits is based solely on MacLachlan's administrative record.

The court also granted the defendants' motion to dismiss the § 404 claims for breach of fiduciary duty, the breach of fiduciary duty claims characterized under §§ 202, 102, and 402, and the § 510 discrimination claims. The court permitted the § 502 (a) (1) (B) claims to recover benefits to proceed as to all named plaintiffs.

The plaintiffs and the defendants have filed motions for summary judgment.[1] For purposes of this motion, the defendants assume that the plaintiffs were technically common law employees, not independent contractors. They assert that the fact-intensive inquiry is not necessary in this case because, regardless of the plaintiffs, status as common law employees, they are ineligible for benefits as a matter of law. Thus, because of the defendants, concession, the plaintiffs, arguments concerning their common-law status loses its significance.

II. DISCUSSION

A. Summary judgment standard

Summary judgment is proper when, viewing the evidence in the light most favorable to the non-movant, "there is 'no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 809 (5th Cir. 1991) ; Fed. R. Civ. P. 56(c). If the moving party meets the initial burden of establishing that there is no genuine issue, the burden shifts to the non-moving party to produce evidence of the existence of a genuine issue for trial. Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2552 (1986). The nonmovant cannot satisfy his summary judgment burden with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. Little v. Liquid Air Corp., 37 F. 3d 1069, 1075 (5th Cir. 1994) (en banc).

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[1] At oral argument, the plaintiffs clarified that their motion concerned only the plan administrator's review of MacLachlan's eligibility under the Mobil plans prior to the 1994 amendments. The defendants do not place such a limitation on their motion for summary judgment and seek dismissal of the claims of all of the plaintiffs under both versions of the plan.

B. Statute of limitations

The defendants assert that the plaintiffs' § 502(a) (1) (B) claims are time barred. The defendants agree that the rule in this circuit is that, for purposes of ERISA, a cause of action does not accrue until an application for a claim is denied. see Paris v. Profit Sharing Plan, 637 F.2d 357 (5th Cir. 1981) . The parties also agree that a ten-year limitations period is applicable to an action for benefits under ERISA. See Kennedy v. Electricians Pension Plan, 954 F.2d 1116, 1120 (5th Cir. 1992). The defendants argue that, even though an ERISA cause of action usually accrues only after a claim for benefits has been denied, a repudiation of the claim has occurred because the plaintiffs knew that they were not entitled to benefits when they began to work for their respective contractors. The defendants acknowledge that the repudiation exception has not been applied in this circuit and that the courts have consistently applied Paris.

The court declines to carve out a repudiation exception in this case and adheres to this circuit's general rule of Paris. MacLachlan was terminated on February 4, 1999, and shortly thereafter filed an appeal of the initial denial of his claim for benefits. His.appeal was denied on March 28, 2000, and the plaintiffs filed their complaint on July 25, 2000, within the ten-year limitations period. Accordingly, the plaintiffs cause of action is timely.

Alternatively, the defendants contend that the claims are barred under the equitable doctrine of laches because the defendants have been prejudiced by the unreasonable delay in bringing the claims. The defendants have not demonstrated that the plaintiffs unreasonably and inexcusably delayed

in bringing the claim for benefits, or that they have been prejudiced by a delay. To the contrary, the plan administrator addressed the merits of MacLachlan's claim and did not disallow the claim because of a late filing. Accordingly, the doctrine of laches is not applicable in this case.

C. Review of the plan administrator's decision

The plaintiffs contend that the plan administrator's denial of benefits contradicts the plain language of the plan and the administrative guide for administration of the plans. The plaintiffs urge the court to apply a de novo standard of review to the plan administrator's decision because the claim was not adequately investigated and there is a conflict of interest because the plan administrator relied on the advice of Exxon Mobil's benefits counsel.[2]

Further, the plaintiffs contend that the defendants, interpretation of the plan is legally incorrect because the plan administrator failed to review the administrative guide for administration of the plan, failed to recognize Mobil's treatment of temporary employees once they have obtained the minimal age and hours-of-service requirements of ERISA, and relied solely on the advice of Douglas Davies, the manager of compensation and benefits within the corporate tax department of mobil and Exxon Mobil.

The plaintiffs argue that Thomas Harrison, the assistant plan administrator, abused his discretion because he relied upon unsubstantiated historical interpretation of the plan,

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[2] There was a merger of Exxon and Mobil in December 1999.

ignoring the plain language of the benefit plan, administrative manual, and summary plan description, which set forth the eligibility requirements. Specifically, the plaintiffs refer to the absence of any language in the plan excluding from participation employees who did not receive a paycheck from Mobil. Defendants counter that, although there is no reference to the necessity for Mobil paychecks, the definition of specific "regular employee," which Mobil consistently used, meant a person receiving a check from Mobil. The plaintiffs contend that the plan administrator's definition of "regular employee" deviated from the language of the plan and is therefore wrong as a matter of law. The defendants contend that ERISA does not require that all common law employees be included in the employer's benefit plans, and the defendants assert that Mobil made the specific decision to cover only those employees who met their definition of "regular employees." They argue that these exclusions, which are not based on age or length of service, are acceptable under ERISA. The defendants contend that the plan administrator's determination that MacLachlan was not a "regular employee" is a legally correct interpretation of the plan text and was not an abuse of discretion.

"ERISA provides the federal courts with jurisdiction to review determinations made by employee benefit plans." Vega v. Nat'l Life Ins. Serv., Inc., 188 F. 3d 287, 295 (5th Cir. 1999) (en banc) ; 29 U. S. C. § 1132 (a) (1 (B) . [W] hen performing the appellate duties of reviewing decision of an ERISA plan administrator, the district court may not engage in fact-finding." Id. Instead, the court review the entire administrative record to determine "whether the record adequately supports the administrator's decision." Vega, 188 F.3d at 298.

1. Abuse of discretion

When an administrator of a plan is vested with discretionary and final authority, the court reviews the administrator's interpretation of the plan for abuse of discretion. Abraham v. Exxon Corp, 85 F.3d 1126, 1131 (5th Cir. 1996) .[3] "[P]lan administrators should be given the full benefit of the discretion afforded to them by their respective plans in interpreting plan terms, be they defined or undefined, with the reasonableness of those interpretations being evaluated against the relevant factual and legal backgrounds." Administrative Committee of the Sea Ray Employees' Stock Ownership Profit Sharing Plan v. Robinson, 164 F.3d 981, 986 (6th Cir. 1999)

At the time of MacLachlan's termination, all responsibility for the plans was given to the plan administrator and the assistant plan administrator.[4] In this case, the plan administrator, Janet Madigan, delegated the responsibility to respond

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[3] Some cases in this circuit suggest a two-step analysis, but the court is not rigidly confined to the analysis in every case. See Duhon v. Texaco, Inc., 15 F.3d 1302, 1307 and n.3 (5th Cir. 1994) Under the two-step analysis, the court first determines whether the administrator's interpretation is legally correct. If it is not, the court determines whether the decision constituted an abuse of discretion. Abraham, 85 F.3d at 1131. In deciding whether an interpretation is legally correct, the court looks to 11 (1) whether the administrator has given the plan a uniform construction, (2) whether the interpretation is consistent with a fair reading of the plan, and (3) any unanticipated costs resulting from different interpretations of the plan." Id.

[4] See Mobil's Retirement Plan, article 12.1.1(a) (the plan administrator's responsibilities include "the exercise of discretion and final authority to determine eligibility to administer and interpret this Plan, . . . the establishment of a claims procedure and the exercise of discretionary and final authority to both conduct a full and fair review of claim

to appeals to Harrison, the assistant plan administrator. Douglas Davies conducted research on the history of the plans and advised Harrison as to MacLachlan eligibility for benefits. Review of the plan administrator's decision is for abuse of discretion; however, because Exxon Mobil administers its own plan, the existence of a conflict of interest is a factor to be considered in determining whether the plan administrator abused his discretion in denying the claim. See Vega, 188 F.3d at 296-97.

2. The plan administrator's decision

On March 28, 2000, the plan administrator denied MacLachlan's claims for benefits based on Article III, section 1 of the Retirement Plan of Mobil Oil Corporation, effective June 1, 1986. This provision identifies the requirements for eligibility to participate in the plan and restricts eligibility to "regular employees" of an "employer-corporation" and "salaried employees in the active employment of Mobil Chemical Company."[5]

(footnote 4 continued)

appeals and to reach a final determination."); Mobil Severance Plan, Section 3 ("the Plan Administrator shall administer the Plan and may interpret the Plan, prescribe, amend and rescind rules and regulation and make all other determinations necessary"); Summary Plan Description for comprehensive medical plan ("the Plan Administrator has the full and exclusive authority to make final determinations"); Mobil's Savings Plan("the administrative fiduciary and financial fiduciary shall have all power and discretion necessary to carry out their duties").

5 All of the plans reviewed by the plan administrator limit participation to "regular-employees" whenever the definition is relevant.

Article II, section (s) defines "regular employee" as follows:

> Regular employee" shall mean an ' individual who has not attained the retirement date specified in section 1 of Article IV who is employed by an employer-corporation for work prior to January 1, 1976 on a regular schedule of at least 20 hours per week for an indefinite period and, after December 31, 1975, for a regular period of at least 1,000 hours of employment per calendar year, or who actually completes 1,000 hours of employment during the 12 months following his date of hire . . . .

An "employer-corporation" "mean[s] and include[s] Mobil Corporation and each subsidiary participating in the Plan.

In 1994, Mobil amended the retirement plan to add language to the existing definition of "regular employee" explicitly defining who was not a regular employee in light of evolving legal doctrines:

> An individual who performs services for an Employer under an agreement or arrangement (which may be written, oral, and/or evidenced by the Employer's payroll practice) with such individual or with any other organization that provides the services of such individual to the Employer, pursuant to which such individual is treated as an independent contractor or is otherwise treated as an individual ineligible for participation in this Plan, shall not be a Regular Employee irrespective of whether he is treated as an employee of an Employer under Common-law employment principles or pursuant to the provisions of section 414(m), 414(n) or 414(o) of the Code.

The plan administrator considered whether MacLachlan was a "regular employee" as defined prior to the 1994 amendment. The plan administrator found that MacLachlan was not "in a formal employment relationship with a participating employer corporation"; therefore, he was not a "regular employee." He found that the most straightforward way to assess whether an employee was a "regular employee" was to determine if he was on the Mobil payroll. The plan administrator reasoned that the "focus on the formalities of the employment relationship provides a bright line that allows Mobil to administer its benefit plans and provides employees and other service providers clarity with respects to their benefits, if any." Harrison explained in his deposition that, "from the very beginning, the root issue was that he was not a regular employee. We had a very well established practice and position in, Mobil of what a regular employee was, being on the company payroll. Mr. MacLachlan had not met that test." Harrison deposition at 41.

The plan administrator determined that MacLachlan was employed by Consolidated Technical Services, Inc. and its successor, Universal Technical Services, Inc. (CTS/UTS) , neither of which is an employer corporation, for the entire period of time that he performed services for Mobil Oil Exploration & Producing Southeast Inc. (MOEPSI).[6] The

[6] MOEPSI entered a contract with CTS On June 17, 1986, to provide specialized technical service to MOEPSI's Systems and Computer Services Department. CTS was required to provide Workmen's Compensation and Comprehensive General Liability insurance. UTS is the successor to CTS. MacLachlan entered a contract with CTS on July 2, 1987, in which " [CTS] desires to employ EMPLOYEE for work to be performed of MOEPSI. " Maclachlan agreed that he was employed by CTS and would report to work at the MOEPSI facility. CTS agreed to pay MacLachlan at the rate of $18 per hour for each authorized hour worked. Group insurance was available to MacLachlan from, CTS after 30 days, of employment. MacLachlan agreed "not to accept employment

plan administrator concluded that MacLachlan's claim that he was entitled to be treated as an employee of MOEPSI for purposes of the benefits plans because he would be considered an employee of MOEPSI under the Internal Revenue Service employment tax regulations and the Louisiana Department of Labor regulations was irrelevant. The plan administrator stated that "[e]ligibility to participate in Mobil's plans is not governed by these laws, and Mobil has consistently limited benefits to persons in a formal employment relationship with a participating employer- corporation, that is, employees who receive paychecks and W-2s from a corporation that participates in Mobil's plans."

The plan administrator then considered MacLachlan's eligibility for each of the individual plans. The plan administrator denied MacLachlan's claim for benefits under the Retirement and Savings Plan because, when MacLachlan began to work for CTS/UTS, eligibility was limited to "regular employees." A "regular employee" was defined as "an individual . . . who is employed by an employer-corporation." He stated that "Mobil has consistently interpreted the term 'regular employee' to refer to a person on the payroll of a participating employer corporation and the phrase 'employed by an employer-corporation' to refer to such a formal employment relationship." The plan administrator found that MacLachlan's services were procured under a written contract with CTS/UTS that provides that "all persons engaged in the performance of said work shall be solely the servants or employees of Contractor

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(footnote 6 continued)

directly or indirectly from [Mobil] for a period of thirty (30 days following the termination of employment of [CTS] without written consent."

[CTS/UTS]." The plan administrator interpreted the intent and effect of the language "solely an employee of CTS/UTS" as excluding participation in the Retirement and Savings Plans. Because "pre-social security benefits" are provided under the Retirement Plan, 'the plan administrator concluded that MacLachlan was not eligible for pre-social security benefits.

The plan administrator denied benefits under the "Mobil Corporation Employee Severance Plan" because, even if MacLachlan had been an employee, the plan to compensate those affected by the change in control of Mobil Corporation was implemented many months after MacLachlan ceased to provide services to Mobil. Further, MacLachlan was not entitled to benefits under the "Separation Benefits Plan of Mobil Corporation and Participating Affiliates" because he was not a "regular employee" as Mobil interpreted that term and the "exclusions for contractors leased employees would apply to him."

As a preliminary matter, the court finds that, the assumption that MacLachlan was a common law employee of Mobil, rather than an independent contractor, does not preclude a finding that he was not a "regular employee" of Mobil as defined in the plans. ERISA contemplates that there will be plans that do not cover all categories of employees. See Administrative Committee of the Sea Ray Employees' Stock Ownership & Profit Sharing Plan, 164 F.3d at 986. Further, ERISA does not mandate that the plan adopt the definition of common law employee or that the plan cover all common law employees. See Bronk v. Mountain States Telephone and Telegraph, Inc., 140 F.3d 1335, 1338 (10th Cir. 1998) ("[A]n employer need not include in its pension plans all employees who meet the test of common law employees.").

The plaintiffs rely on Vizcaino v. Microsoft Corp., 97 F.3d 1187 (9th Cir. 1996) for the proposition that "contingent common law workers misclassified as independent contractors . . . [are] entitled to benefits where not specifically excluded by plain language." In Vizcaino, a group of freelance employees, who were hired directly by Microsoft, paid through accounts payable, and classified by Microsoft as temporary employees or independent contractors, filed a class action as "common-law employees" seeking benefits that the company provided to its core staff of regular or permanent employees. Id. at 1189. The question presented was whether common law,employees, who worked as freelancers, were payroll employees of Microsoft during the period they worked directly for Microsoft prior to Microsoft's decision to hire some of them and to arrange that others become employees of unrelated employment agencies (without Microsoft benefits) who had contracts with Microsoft. Id. at 1018 (concurring and dissenting opinion identifying precisely what period of activity was at issue in the case) . All of the plaintiffs agreed that the freelancers that had been converted to outside employment agencies had no valid claim for participation after the date of their conversion. Id. The Court of Appeals, sitting *en banc,* concluded that, in the period prior to the conversion, the freelancers were "employees of Microsoft, and not independent contractors," and the reasons for rejecting participation in the benefits plans was invalid. Id. at 1015.

Vizcaino is distinguishable from this case. Unlike Vizcaino, MacLachlan was never hired directly by Mobil. His situation is more closely aligned with the Microsoft workers who agreed that they were not employees of Microsoft after they were converted to employees of outside

agencies. Even assuming that MacLachlan fits the definition of common law employee, he would not be included in the pre-1994 or post-1994 Mobil plan unless he were a regular employee. Therefore, the question before the court is whether the plan administrator's finding that MacLachlan was not a "regular employee" was an abuse of discretion.

Under the pre-1994 Mobil plans, the term "regular employee" includes only those employed by an "employer corporation," which means Mobil or a subsidiary of Mobil.. The record supports the finding that MacLachlan was not employed by Mobil or a Mobil subsidiary as required by the plan definition of "employer corporation." MacLachlan entered a written contract with CTS/UTS by which he was included on CTS/UTS's, payroll, was eligible to participate in the company's group benefit plans after 30 days of service, and could not accept a position with Mobil within 30 days of termination without the written consent of CTS/UTS. MacLachlan's contract required him to report to work at a Mobil facility; however, nothing in the contract with CTS/UTS indicates that Mobil or a Mobil subsidiary was his employer. Because MacLachlan was not employed by an "employer corporation," the plan administrator's finding that MacLachlan was not "in a formal employment relationship with a participating employer corporation" and, thereby, not a "regular employer" was reasonable.

Further, the language in the post-1994 amended definition of "regular employee" specifically excludes MacLachlan from the Mobil plans. The definition of "regular employee" remained the same; however, language was added to the definition to clarify that an individual who provides services to Mobil through an agreement with the indi-

vidual or an organization is not a "regular employee," even if he is treated as an employee under the common law employment principles or the tax laws. MacLachlan provided services to Mobil through agreements between Mobil and CTS/UTS and between CTS/UTS and MacLachlan. Therefore, not only is MacLachlan not included in the pre-1994 definition of "regular employee," he is explicitly excluded, from participation in the Mobil plans under the post-1994 amended definition of "regular employee."

The plan administrator went beyond the language of the plan defining "regular employer" and focused on the formality that a "regular employee" be on the payroll as a "bright line" test. The plan administrator's additional interpretation of "regular employee" was not unreasonable because a "regular employee" would necessarily be on the payroll of Mobil or a Mobil subsidiary.[7] Further, Davies stated in his deposition that, although no retirement plan contains the word "paycheck" or "pay stub," Mobil has always intended that the term "regular employee" in the plans mean "a payroll employee, a person receiving a check from a company is the employee of that company." Davies deposition at 35-36.

MacLachlan argues that there is a conflict of interest because the plan administrator relied on the advice of Davies, Exxon Mobil's benefits counsel, in reaching his conclusion. However, he has not presented evidence to show that the plan

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[7] Cf. Hensley v. Northwest Permanente P.C. Retirement Plan & Trust, 258 F.3d 986(9th Cir. 2001). In Hensley, the plan administrator applied a "W-2" definition to the term "employee" because the plan did not define employee. The Court of Appeals held that the application of the "W-.2", definition was not "so patently arbitrary and unreasonable as to lack foundation in factual basis and/or authority in governing case or statute law." Id. at 1001.

administrator was in fact influenced by such conflict. Davies stated in his deposition that his role was to review the historical plan texts and to inquire if there had been similar claims in the past and how they were decided. He added that he was not aware of any claims similar to MacLachlan's claim.: Davies deposition at 22, 29. Davies stated that he certainly advised the plan administrator, but the decision and interpretation was that of the plan administrator. Id. at 39.

Further, there is no merit to the argument that MacLachlan is a regular employee because he meets the definition of "temporary employee" in the policy guidelines to administration of the plan because he completed 1,000 hours of service within the first 12 months of original employment. Section 1052(a) forbids employers to deny participation in an ERISA plan on the basis of age or length of service if the. employee is at least 21 years old and has completed at least one year of service. "Section 1052(a) does not prevent employers from denying participation in an ERISA plan if the employer does so on a basis other than age or length of service. Abraham, 85 F.3d at 1129. As discussed above, eligibility for participation in the Mobil plans is limited to "regular employees." However, under the policy guidelines, a "temporary employee" may be eligible to participate as a "regular employee" if he is employed by an "employer-corporation participating in the plan." Because MacLachlan was employed by CTS/UTS and not by a participating Mobil corporation or subsidiary, he does not meet the definition of a "regular employee."

III. CONCLUSION

Therefore, the language of the plan supports the decision

that eligibility for the Mobil plans is restricted to employees of Mobil or a Mobil subsidiary, and the plan administrator did not abuse his discretion in his determination that MacLachlan did not meet the definition of "regular employee."

Accordingly, there are no disputed issues of material fact, and Exxon Mobil is entitled to judgment as a matter of law that MacLachlan is not entitled to benefits under the Mobil plans. Further, the remaining plaintiffs have offered no facts or arguments in opposition to Mobil's motion for summary judgment that their claims are distinguishable from those of MacLachlan. Therefore, Exxon Mobil is entitled to judgment as a matter of law on the claims of Brown, Manley, Spurlock, Stahr, and Zainotz as well.

New Orleans, Louisiana, this 18 day of September, 2002.

/s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOHN MACLACHLAN ET AL.	CIVIL ACTION
VERSUS	NO: 00-2190
EXXON MOBIL CORP. ET AL.	SECTION: "S" (4)

Filed Dec 5, 2002

ORDER

IT IS HEREBY ORDERED that the "Plaintiffs' Rule 59(e) Motion to Alter and Amend" the judgment entered on September 19, 2002, is **DENIED.** (Document #100.)

A Rule 59(e) motion calls into question the correctness of a judgment. See In re Transtexas Gas Corp., 303 F. 3d 571, 581 (5th Cir. 2002) . A Rule 59 (e) motion is invoked "to correct manifest errors of law or fact or to present newly discovered evidence." Waltman v. Int'l Paper Co., 875 F. 2d 468, 473 (5th Cir. 1989).

The plaintiffs contend that the court failed to consider documentary evidence, which refutes Mobil's reliance on the administrative record and the plan administrator's conclusions. Specifically, the documents are memoranda from the office of the general counsel in Dallas, Texas, dated June 23, 1989 and in New Orleans, Louisiana, dated May 1, 1990. The plaintiffs argue that the documents are significant because they indicate that the definition of an employee is governed by federal employment tax regulation, not by the issuance and receipt of a Mobil paycheck.

Contrary to the plaintiffs, contention, the court considered inter alia the memoranda of the general counsel in reviewing the plan administrator's decision and determined that the documents do not provide evidentiary support for the plaintiffs' arguments. The documents are internal memoranda from the general counsel advising attorneys and managers of Mobil Exploration and Producing U.S. (MEPUS) of the potential for legal consequences related to the designation of employees as independent contractors and offering alternative solutions to reduce or eliminate exposure.[1] In this case, the defendants assumed that the plaintiffs were common law employees, not independent contractors, for purposes of the summary judgment motions. Therefore, the focus of the review of the plan administrator's decision is whether the plaintiffs are eligible for benefits as a "regular employee" of an "employer corporation." The memoranda of counsel do not address this inquiry. Further, the memoranda do not have historical significance or provide evidence of whether the plan administrator has given the plan a uniform construction because the documents do not represent an interpretation or the administration of any Mobil plan or a decision concerning the eligibility of any Mobil benefits claimant.

Accordingly, the plaintiffs have not demonstrated that there are manifest errors of law or fact that call into question the correctness of the judgment, and the motion to alter or amend the judgment is denied.

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[1] In an earlier ruling, the court concluded that the documents were not protected by the attorney-client privilege.

New Orleans, Louisiana, this 5 day of December, 2002.

/s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

APPENDIX C

In the
United States Court of Appeals
for the Fifth Circuit

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m 02-31249

Filed
November 20, 2003

JOHN MACLACHLAN; JAMES BROWN;
STEPHEN K. MANLEY;
ALAINA SPURLOCK; BERND STAHR;
MICHAEL ZAINOTZ,
ON BEHALF OF THEMSELVES AND ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

VERSUS

EXXONMOBIL CORPORATION (SUCCESSOR BY
MERGER TO MOBIL CORPORATION),
AS TRUSTEE ADMINISTRATOR AND FIDUCIARY OF
RETIREMENT, SAVINGS, SEVERANCE,
SEPARATION, INSURANCE, AND OTHER
MISCELLANEOUS EMPLOYEE BENEFIT/WELFARE
PLANS OF MOBIL CORPORATION;
THOMAS C. HARRISON,
AS ASSISTANT ADMINISTRATOR BENEFITS OF
EXXONMOBIL CORPORATION, RETIREMENT,
SAVINGS, SEVERANCE, SEPARATION, INSURANCE,
AND OTHER MISCELLANEOUS BENEFIT
PLANS OF
EXXONMOBIL CORPORATION;

RETIREMENT PLAN,
ALSO KNOWN AS MOBIL RETIREMENT PLAN;
COMPREHENSIVE MEDICAL PLAN,
ALSO KNOWN AS MOBIL MEDICAL PLAN;
DENTAL ASSISTANCE PROVISIONS,
ALSO KNOWN AS MOBIL DENTAL PLAN;
DEPENDENT GROUP LIFE INSURANCE PLAN,
ALSO KNOWN AS
MOBIL GROUP LIFE INSURANCE PLAN;
DISABILITY INCOME PLAN;
EMPLOYEE STOCK OWNERSHIP PLAN,
ALSO KNOWN AS MOBIL STOCK PLAN;
EMPLOYEE SAVINGS PLAN,
ALSO KNOWN AS MOBIL SAVINGS PLAN;
LIFE INSURANCE PLAN,
ALSO KNOWN AS MOBIL LIFE INSURANCE PLAN;
PRE-SOCIAL SECURITY PLAN,
ALSO KNOWN AS
MOBIL PRE-SOCIAL SECURITY PLAN;
TERMINATION ALLOWANCE PLAN;
EMPLOYEE SEVERANCE PLAN,
ALSO KNOWN AS MOBIL SEVERANCE PLAN;
EMPLOYEE SEPARATION BENEFIT PLAN,
ALSO KNOWN AS SEPARATION BENEFIT PLAN,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before JOLLY, SMITH, and EMILIO M. GARZA,
Circuit Judges.
JERRY E. SMITH, Circuit Judge:

The six named plaintiffs, all workers who formerly performed services for Mobil Corporation while on the payroll of third-party companies, filed this class action complaint seeking retroactive employment benefits from Exxon-Mobil Corporation and other defendants (hereinafter collectively "Mobil"), after the merger of Mobil Corporation and Exxon Corporation, pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U. S. C. § 1001 *et seq.* The district court granted summary judgment for Mobil. Finding no error, we affirm.

I.

Like many companies, Mobil seeks to attract and reward capable employees by offering a variety of health, vacation, and other benefits. These benefits are expensive, however, and in an effort to reduce costs, Mobil began, in the early 1980's, to hire some of its employees through third-party payroll companies.

Employees hired in that fashion performed services similar or identical to those of other Mobil employees while on Mobil's premises and under its supervision. They often worked side-by-side with other Mobil employees, and the services they provided were not highly specialized or individualized. They were not, however, on Mobil's payroll. This appeal presents the question whether such employees-specifically, the six named plaintiffs and the putative class on behalf of which they are suing are eligible to collect benefits under the governing Mobil benefit plans.

Plaintiff John MacLachlan provided services for Mobil but was not on its payroll. Rather, during the eleven years he

worked as an electronics technician for Mobil, he was directly employed and paid by two other companies: Consolidated Technical Services, Inc, ("CTS"), between 1987 and 1989; and Universal Technical Services, Inc. ("UTS"), from 1989 to 1999. MacLachlan's contract with CTS specified that he was to report for work at the job site of Mobil Oil Exploration & Producing Southeast, Inc. His involvement with Mobil ended when he was terminated by UTS without cause on February 4, 1999. He was eligible for employment benefits offered by CTS and UTS.

Similarly, the other named plaintiffs performed services for Mobil while under the direct employ of a third party. James Brown spent a decade as a mechanic for Mobil Aviation in Morgan City, Louisiana, but was paid by three different firms: Lee Services from 1989 to 1990; Jet Professionals from 1990 to 1992; and Excalibur from 1992 to 1999. Stephen Manley worked as a dispatcher and flight controller for Mobil Aviation from 1983 to 1999, during which time he was paid by Jet Professionals, from 1983 to 1986; Lee Services, from 1986 to 1994; and Excalibur, from 1994 to 1999. Alaina Spurlock was a clerical support staffer for Mobil Aviation, first while on the payroll of Lee Services from 1988 to 1994; then while on the payroll of Excalibur from 1994 to 1999. Bernd Stahr was a computer operator for Mobil in New Orleans from 1986 to 1996, spending the duration of that period on the payroll of Software & Scanning Service. Michael Zainotz was hired to be a computer systems administrator for Mobil's New Orleans office and worked in that capacity while on the payroll of Computerized Process from 1986 through 1999.

The putative class also is comprised of former Mobil workers who were on the payroll of third parties. As defined by the plaintiffs, the class consists of "all persons, past, present and future, employed in or at Defendant Mobil's facilities in the United States who perform(ed) personal services for Mobil and who are not, or were not, classified as regular employees of Mobil, but instead are or were classified as independent contractors or employees of third party agencies for ... one year."

Under the relevant Mobil plans, eligibility is restricted to "regular employees," but there are two definitions of that term in the record. First, as used in the retirement plan that was in effect at the time MacLachlan began working for Mobil, a "regular employee" is "an individual . . . who is employed by an employer corporation for work ... for a regular period of at least 1,000 hours of employment per calendar year." An "employer corporation," as used in the plan, is "Mobil Corporation and each subsidiary participating in the Plan." The definitions in this plan make no mention of payroll status as a defining criteria, nor of an exclusion of non-payroll employees from the plan.[1]

The second definition comes from a 1994 amendment to the retirement plan that specifically excludes employees of third parties and independent contractors. That plan provides: "An individual who performs services for an Employer under an agreement. . . pursuant to which such

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[1] Although plaintiffs base their claims for benefits on several different plans, all the claims arise under plans that limit participation to "regular employees."

individual is treated as an independent contractor. . . shall not be a 'Regular Employee irrespective of whether he is treated as an employee of an Employer under Common-law employment principles . . . ."

All the relevant plans also include language vesting the administrator with the discretion to interpret the plans and to determine whether claimants are eligible for benefits. Under the retirement plan, a designated plan administrator is vested with the "discretion and final authority to determine eligibility ... and to reach a final determination." Similarly, for the severance plan, the administrator "may interpret the plan ... and make all other determinations necessary." And, under the savings plan, "the administrative fiduciary shall have all power and discretion necessary. . . to carry out their duties."

II.

In March 1999, following his termination by Mobil, MacLachlan sent a letter to Mobil's employee benefits administrators formally requesting retroactive employment benefits.[2] He made the request on the ground that he was a "common law employee" of Mobil, a term that he argued should be read to fit within the plan's definition of "regular employee."

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[2] MacLachlan's co-plaintiffs did not first pursue their claims through Mobil's administrative process. The district court excused this failure on the ground that it would have been futile for them to do so. As a consequence, however, the administrative record refers only to actions taken with respect to MacLachlan's claims.

Exxon and Mobil merged in December 1999, some ten months after MacLachlan lost his job with UTS and nine months after he contacted Mobil about his eligibility for benefits. It was not until after the merger that Thomas Harrison, an assistant plan administrator with the delegated authority to decide claims, first took action on MacLachlan's petition.

Before the merger, Harrison was an Exxon employee and had not previously reviewed a claim for benefits under the Mobil plans. To make his decision, he reviewed the terms of the Mobil plans described above as well as MacLachlan's employment history with Mobil and CTS/UTS. Harrison also discussed the history of the plan's administration with Doug Davies, an ExxonMobil attorney who worked in Mobil's benefits division before the merger.

Davies informed Harrison that there was no record of Mobil's paying benefits to similarly situated third-party contractors. Davies also stated his belief that MacLachlan was the first contractor to file a claim seeking benefits. Harrison's investigation revealed that Mobil historically had mailed information about benefits only to payroll employees. On the basis of this record, Harrison concluded that contractors such as MacLachlan are outside the plan's definition of "regular employees" and thus are ineligible for benefits.

In March 2000, Harrison sent a letter to MacLachlan's attorney, formally denying benefits. Harrison explained that Mobil was denying MacLachlan's claims because MacLachlan had been employed by CTS/UTS and had not been on the Mobil payroll. Moreover, as Harrison stated, even if MacLachlan had been a common-law employee for tax purposes, "Mobil has consistently limited benefits to

persons in a formal employment relationship with a participating employer-corporation."[3]

Harrison also made specific findings with respect to the different Mobil plans. MacLachlan was ineligible for the Retirement and Savings Plan, Harrison found, not only because MacLachlan was not on the payroll, but also because the terms of the plan exclude any person "retained by an employer-corporation under written contract on a consulting basis" or "employed by an employer corporation under a written contract where the terms of such written contract exclude participation in the Plan." Harrison concluded that a provision in MacLachlan's contract with CTS was intended to have this effect, because it stated that MacLachlan was "solely" an employee of CTS.

Harrison also declared that MacLachlan was not entitled to participate in the Severance Plan, because that plan applied only to employees terminated on, or within two years after, the date on which a change in control of Mobil occurs. Here, the merger between Exxon and Mobil did not occur until after MacLachlan had been terminated. Accordingly, Harrison concluded, MacLachlan would have been unable to receive benefits under that plan, even if he had been a Mobil employee at the time of his termination.

MacLachlan and his co-plaintiffs then sued for retroactive employment benefits under ERISA § 502 (a)(1)(B); claims for breach of fiduciary duty under ERISA § § 102, 202, 402

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[3] At MacLachlan's request, Harrison's decision constituted both the original decision and appeal of MacLachlan's claims, and it exhausted MacLachlan's administrative recourse.

and 404; a claim for discrimination under ERISA § 510; and Louisiana state law claims. The plaintiffs maintained, as had MacLachlan in the administrative proceedings, that they are common-law employees, eligible for benefits under the Mobil plans.[4] The district court dismissed the state claims, the breach of fiduciary duty claims, and the discrimination claim, and plaintiffs did not appeal. The case proceeded on the § 502(a)(1)(B) claim for benefits until the district court granted Mobil's motion for summary judgment.

III.

We review a summary judgment *de novo,* applying the same standards as did the district court. *Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.,* 322 F.3d 847, 853 (5th Cir. 2003). Summary judgment should be granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; FED. R. Civ. P. 56(c). In determining whether there is a genuine issue of material fact, we review the evidence and the inferences to be drawn therefrom in the light most favorable to the non-moving party. *Daniels v. City of Arlington, Tex.*, 246 F.3d 500, 502 (5th Cir. 2001).

Plaintiffs argue that the district court applied the incorrect standard of review. This is a question of law that we review *de novo. Chevron Chem. Co. v. Oil, Chem. & Atomic Workers Local Union 4-447,* 47 F.3d 139, 142 (5th Cir. 1995).

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[4] Mobil concedes, for purposes of summary judgment only, that plaintiffs are common law employees.

ERISA authorizes the district court to review a denial of a claim for benefits, *see 29* U.S.C. § 1132(a)(1)(B), but the statute provides no guidance on the appropriate standard of review for the courts. *Vega v. Nat'l Life Ins. Serv. Co., 188* F.3d *287, 295* (5th Cir. *1999)* (en bane). Where a plan administrator has been vested with the discretionary authority to interpret a benefit plan, a district court reviews the administrator's interpretations only for abuse of discretion. [5] "[O]ur review of the administrator's decision need not be particularly complex or technical; it need only assure that the administrator's decision fall somewhere on a continuum of reasonableness–even. if on the low end." *Vega,* 188 F.3d at 297.

Where, however, an administrator's decision is tainted by a conflict of interest, the court employs a "sliding scale" to evaluating whether there was an abuse of discretion. Id. This approach does not mark a change in the applicable standard, but only requires the court to reduce the amount of deference it provides to an administrator's decision.[6]

The degree to which a court must abrogate its deference to the administrator depends on the extent to which the chal-

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[5] *Firestone Tire & Rubber Co v. Bruch,* 489 U.S. 101, 115 (1989). *See also Vega,* 188 F.3d at 295 (stating that "when an administrator has discretionary authority with respect to the decision at issue, the standard of review should be one of abuse of discretion").

[6] *Vega,* 188 F.3d at 299; *see also Bratton v. Nat'l Union Fire Ins. Co.,* 215 F.3d 516, 521 n.4 (5th Cir. 2000) ("Under this 'sliding scale' standard, the court applies the abuse of discretion standard, giving less deference to the administrator in proportion to the administrator's apparent conflict.").

lenging party has succeeded in substantiating its claim that there is a conflict. "The greater the evidence of conflict on the part of the administrator, the less deferential our abuse of discretion standard will be." *Id.* Where, however, only "a minimal basis for a conflict is established, we review the decision with 'only a modicum less deference than we otherwise would.'" *Lain v. UNUM Life Ins. Co. of Am.*, 279 F.3d 337, 343 (5th Cir. 2002) (quoting *Vega*, 188 F.3d at 301).

Plaintiffs concede that the administrator has the discretion and final authority to determine eligibility for benefits and that the abuse of discretion standard applies.[7] Plaintiffs nonetheless maintain that because of an apparent conflict of interest, the district court did not sufficiently apply "closer judicial scrutiny" to the administrator's decision, thus failing to apply the sliding scale standard correctly.

This assertion does not merit reversal. Even if, *arguendo*, there were a conflict of interest,[8] the district court recog-

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[7] In the district court, plaintiffs urged *de novo* review as a result of the conflict of interest. The court correctly rejected this standard in favor of the abuse of discretion standard.

[8] The district court assumed there is a conflict of interest because Mobil interprets and administers its own plan, leaving open the possibility that it would limit claims to reduce its liability. The court need not have made this assumption. The mere fact that benefit claims are decided by a paid human resources administrator who works for the defendant corporation does not, without more, suffice to create an inherent conflict of interest. Were that enough, there would be a near-presumption of a conflict of interest in every case in which an employer both offers a plan and pays someone to administer it, making a full application of the abuse of discretion standard the exception, not the rule.

nized it and applied the appropriate standard of review. Plaintiffs' claim is contradicted by *two* statements the district court made in its summary judgment order. First, it announced the above rule from *Vega* and acknowledged that an apparent conflict may exist because "ExxonMobil administers its own plan" (citing *Vega*, 188 F.3d at 296-97). The courl then correctly stated that this is a factor to be considered in its assessment of whether there was an abuse of discretion.

Second, the court addressed a more specific allegation of a conflict of interest and concluded that it did not require any lessening of the deference owed to the administrator:

> MacLachlan argues that there is a conflict of interest because the plan administrator relied on the advice of Davies, Exxon Mobil's benefits counsel, in reaching his conclusion. However, he has not presented evidence to show that the plan administrator was in fact influenced by such conflict .... Davies stated that he certainly advised the plan administrator, but the decision and interpretation was that of the plan administrator.

(footnote 8 continued)

Vega did not profess to create such a presumption, and we do not read it to have created one for cases of this sort. Rather, this court's decisions, following *Vega*, that have found an apparent conflict of interest are ones in which a claim was denied by an insurance company that did not employ the claimant, but instead was contractually obligated to make payments under the employer's plan. *See, eg., Vega*, 188 F.3d at 289; *Gooden v. Provident Life & Acc. Ins. Co.*, 250 F.3d 329,333 (5th Cir. 2001); *Lain,* 279 F.3d at 343.

This is a significant distinction, because corporations that pay generous levels of benefits to their workers do so for self-interested reasons: Such benefits are one part of the total package of compensation that employers use to attract and retain capable workers. It is therefore less than patently obvious that employers would systematically benefit from a denial of meritorious claims.

(Internal citations omitted.)

Plaintiffs argue that the district court erred in requiring evidence that the conflict had an effect before it would apply the sliding scale. It is apparent from the court's opinion, however, that it did abrogate its deference in consideration of the first claim of a conflict of interest, and only refused to slide further *down* the scale on the basis of a second, unsubstantiated claim that the administrator was conflicted.

Unlike the inherent conflict that the court acknowledged might exist merely because Harrison is a paid employee of Exxon Mobil, there was no evidence that the administrator's decision could have been improperly influenced by Harrison's decision to ask Davies-a veteran Mobil employee who was familiar with the plans in question-for information on historical interpretations of the plan. It was not error to require proof on this point, because the court is required to lessen its deference only in proportion to the amount of conflict demonstrated by the challenging party.[9] Accordingly, the district court correctly applied the sliding scale standard.

Next, plaintiffs challenge the refusal to give evidentiary weight to two internal legal memoranda. Plaintiffs contend that these documents concede the eligibility of third party contractors for benefits under the Mobil plan. Plaintiffs do not characterize this claim as a challenge to the district court's factual determinations, a claim we would review for

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[9] *Vega,* 188 F.3d at 297 ("The greater the evidence of conflict on the part of the administrator, the less deferential our abuse of discretion standard will be."); *see also Lain, 279* F.3d *at 343; Bratton,* 215 F.3d at 521 n.4.

clear error under FED R. CIV. P. 52(a). Rather, they couch the issue as a question of law: that the district court failed to consider evidence, violating a standard of review announced in *Wildbur v. ARCO Chem.* Co., 974 F.2d 631, 645 (5th Cir.), *clarified,* 979 F.2d 1013 (5th Cir. 1992).

This contention is squarely contradicted by the record. In its order denying plaintiffs' rule 59(e) motion to amend, the district court stated: "Contrary to the plaintiffs' contention, the court considered *inter alia* the memoranda of the general counsel in reviewing the plan administrator's decision, and determined that documents do not provide evidentiary support for the plaintiffs' arguments." *Wilbur* does not require the court to give credence to every piece of evidence that comes before it. Rather, in *Wilbur*, 974 F.2d at 645, we merely stated that we were "unable to perform our coordinate role of reviewing the decision of the district court because we cannot tell whether the court properly evaluated all of the potentially relevant evidence." That is not the case here, because the court openly stated that it considered the evidence and found it to be lacking in probative value.[10]

Even if plaintiffs had challenged the district court's weighing of the evidence, we would not have found the decision to be clearly erroneous, because the documents do not support the reading plaintiffs give them. The first memorandum, from F.K. Joiner of the Office of General

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[10] Mobil contends that the memoranda are privileged and should not have been considered by the district court at all. That issue, however, was the subject of an earlier ruling. Mobil failed to cross appeal that order, so we lack jurisdiction to consider their challenge to it. *Torres v. Oakland Scavenger Co.,* 487 U.S. 312 (1988).

Counsel, merely asserts one lawyer's "concern[] that *if* a Mobil independent contractor were deemed an employee for tax reasons, that the employee *would then seek* to obtain the other benefits of employment" (emphasis added). The second memorandum, from W.C. Whittemore of the same office, similarly recognizes that independent contractors might one day seek to claim Mobil benefits, and suggests strategies to "reduce or eliminate your exposure." These documents by no means concede that the appellants were eligible for benefits.

Plaintiffs' next challenge goes to the merits of the district court's determination that the administrator did not abuse his discretion. In reviewing a plan for abuse of discretion, the district court first must determine whether the administrator's interpretation is legally correct; if it is not, the court must decide whether the decision was an abuse of discretion. *Abraham v. Exxon Corp.*, 85 F.3d 1126, 1131 (5th Cir. 1996); *Pickrom v. Belger Cartage Serv.*, 57 F.3d 468, 471 (5th Cir. 1995).

For the first part of the inquiry, the courts assess three factors to determine whether the interpretation is legally correct: (1) whether the administrator has given the plan a uniform construction; (2) whether the interpretation is consistent with a fair reading of the plan; and (3) any unanticipated costs resulting from different interpretations of the plan. *Wildbur*, 974 F.2d at 638. In some cases, however, the court may skip this first part of the inquiry if it can determine that the decision was not an abuse of discretion. *Duhon v. Texaco, Inc., 15* F.3d 1302, 1307 n.3 (5th Cir. 1994). The district court opted to follow that path, and determined that Harrison's interpretation of the plan was not an abuse of discretion.

That conclusion is amply supported by the record. Harrison conducted a thorough investigation of the plan and the history of its administration. He determined that the term 44 regular employee" was meant to refer to employees on the payroll of Mobil or a participating employer corporation, and that no one had been paid benefits under the plan without first being on the Mobil payroll. The history of the plan's administration therefore supports the finding that this interpretation was not an abuse of discretion.

Harrison's analysis also finds support in the contract between MacLachlan and CTS. As the district court noted:

> MacLachlan entered a written contract with CTS/UTS by which he was included on CTS/UTS's payroll, was eligible to participate in the company's group benefits plans after 30 days of service, and could not accept a position with Mobil within 30 days of termination without the written consent of CTS/UTS ....

It is entirely reasonable for an administrator to conclude that a person who performs services for Mobil under such terms is not a "regular" employee of the Mobil corporation.

Although the district court did not refer to it, Harrison listed an additional basis for his conclusion that MacLachlan was not an employee of Mobil. In denying MacLachlan's claims, Harrison pointed out that the contract between CTS and Mobil had a provision that "all persons engaged in the performance of said work shall be solely the servants or employees of Contractor." Plaintiffs contend this is irrelevant, because MacLachlan cannot be bound by a contract to which he was not a party.

To the contrary, the evidence is relevant, because it is probative of Mobil's intent in hiring third party contractors. The fact that Mobil hired MacLachlan pursuant to a contract that provided be was solely the employee of CTS is probative of the fact that he was not hired as a "regular employee" of Mobil, and it supports the administrator's interpretation.

To be sure, plaintiffs' reading of the Mobil plan is at least plausible in that before the 1994 amendment the plan did not specifically exclude common law employees. But the plan does not explicitly include such employees, either. The remedy for such an ambiguity in a plan's language is not the compelled inclusion of all employees who arguably fit within its scope, but rather, the exercise of interpretive discretion by a duly empowered administrator. Harrison's decision that third-party contractors are not included in the plan was not an abuse of that discretion.

Not content to argue under existing law, plaintiffs, citing *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002), and *Jenkins v. S. Farm Bureau Cas.*, 307 F.3d 741 (8th Cir. 2002), assert that "emerging judicial doctrine" supports their interpretation of the plan. The issue in *Sidley* was whether certain equity partners of a law firm were "employees" for purposes of the Age Discrimination in Employment Act of 1967 ("ADEA"). *Sidley Austin Brown & Wood,* 315 F.3d at 699. *Jenkins,* 307 F.3d at 741, similarly addresses whether an insurance manager was an employee for purposes of the ADEA.

Whether these cases are the vanguard of an emerging judicial doctrine is a matter for the legal academy; they do not help us decide the appeal now before us: whether, on the

facts of this case, the administrator abused his discretion. ERISA does not require Mobil to define its benefits plans in such a way as to provide coverage for all employees, irrespective of whether they are protected by the ADEA. To the contrary, it is well established that an employee may be a common law employee for some purposes, yet not entitled to benefits under a benefit plan. *Abraham,* 85 F.3d at 1130.

IV.

As an alternative theory, Mobil argued before the district court, and again before this court, that plaintiffs' claims are barred by the statute of limitations. If not, Mobil contends, they should be barred by the equitable doctrine of laches.

We do not address the merits of these arguments, because they do not affect the result we reach today.

AFFIRMED.

APPENDIX D

OFFICE OF GENERAL COUNSEL

MEPUS - Dallas
DATE: June 23, 1989
TO: ALL MEPUS ATTORNEYS

CC: R. N. Johanson - NY
Cliff Omo - DAC

RE: INDEPENDENT CONTRACTORS

AS I related to you at the recent lawyers' meeting in Houston, there are numerous problems with using "independent contractors" to perform duties traditionally assigned to employees. This issue has recently come to the fore front as a result of the Tax Reform Act of 1986. Section 530 of the Code, referred to as the "Safe harbor provision" prohibits the M from reclassifying certain individuals as employees. An employer's classification of an individual as an independent contractor will be considered reasonable if it were made in reasonable reliance of recognized practice in the taxpayer's industry, among other things.
However this moratorium on reclassification has been lifted for individuals retained to provide services as engineers, designers, computer programmers, system analysts and other similarly skilled individuals. Thus the IRS will apply the common law standard in determining the proper classification of those individuals.

In Revenue Ruling 87-41, the IRS set out 20 factors that it has considered in identifying whether sufficient control is

present in an employment situation to establish an employer /employee relationship. The Ruling provides that the relationship of employer/employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. However, individuals who follow an independent trade, business, or profession in which they offer their services to the public, generally are not employees. If the relationship of employer/employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Therefore, the mere fact that we have a contract which states that an individual is an independent contractor will not be binding upon the IRS.

I raise this concern because we had recently received a letter from the IRS regarding an former independent contractor/ employee, and because of the, letter we received from a current independent contractor indicating that he had been advised by his CPA that he was an employee of Mobil and not an independent contractor under revenue rulings. If an independent contractor were determined to be an employee, then Mobil would be liable to the IRS for the payment of the employment taxes (FICA, FUSA and income tax withholdings) as well as penalties. I was also concerned that if a Mobil independent contractor were deemed an employee for tax reasons, that the employee would then seek to obtain the other benefits of employment such as vacation, pensions, and 401K Plan. These employee benefits represent a much greater liability to Mobil than the - liabilities related to the taxes. In addition and of perhaps more personal interest to

management is the 100% penalty provision of Code Section 6672. According to an article in the June issue of Colorado Lawyer, the section "imposes personal liability on responsible officers and employees who willfully fail to collect, account for and pay income tax withholding or social security tax. . . Under this section a responsible officer or employee of a company who treats the company's worker as independent contractors, knowing they should be treated as employees, is potentially subject to personal liability for the misclassification." The liability would be equal to the amount of uncollected taxes.

For these reasons I urge that you insure that your management team is aware of the legal consequences related to improperly designating employees as independent contractors. The following is a listing of the factors considered by the IRS in making a determination of employment status:

1. **Instructions.**

   A worker who is requized to comply with other person's instructions about when, where, and how he or she is to work is ordinarily an employee.

2. **Training.**

   Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular manner, and the worker is an employee.

3. **Integration.**

   Integration of the worker's services into the business operations generally shows that the worker is subject, to direction and control.

4. **Services Rendered Personally.**

   If the services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the method used to accomplish the work as well as the results.

5. **Hiring, Supervising and Paying Assistance.**

   If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shown control over the workers on the job. However, if a worker hires, supervises and pays other assistants pursuant to a contract under which the worker agrees to provide materials and labor, this factor indicates an independent contractor status.

6. **Continuing Relationship.**

   A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer/employee relationship exists.

7. **Set Hours of Work.**

8. **Full Time Required.**

   An independent contractor is free to work when and for whom he or she chooses. An employee is not.

9. **Doing Work an Employer's Premises.**

10. **Order or Sequence Set.**

    If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the workers own pattern of work but must follow the established routines and schedules of the other person.

11. **Oral or Written Reports.**

    A requirement that the worker submit regular written reports to the person or persons for who the services are performed indicates a degree of control.

12. **Payment by Hour, Week, Month.**

    Payment made by the Job on a straight commission generally indicates that the worker is an independent contractor; payment by the hour, week, or month generally points to an employer or employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of the job.

13. **Payment of Business and/or Travel Expenses.**

14. **Furnishing of Tools and Materials.**

15. **Significant Investment.**

    If the worker invests in facilities (such as the maintenance of an office) that factor tends to indicate that the worker is an independent contractor.

16. **Realization of Profit or Loss.**

    A worker who is subject to a real risk of economic loss due to the services to be performed, is generally considered an independent contractor.

17. **Working for More Than One Firm at a Time.**

    This factor generally indicates that the worker is an independent contractor.

18. **Making Services Available to General Public.**

    This factor indicates an independent contractor relationship.

19. **Right to Discharge.**

    The right to discharge a worker is a factor indicating that the worker is an employee. An independent contractor generally cannot be fired so long as the independent contractor produces a result that meets the contract specifications.

20. **Right to Terminate.**

If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates employer/ employee relationship.

I hope you find the above of some help in assessing this situation.

/s/ Joyner
F. K. Joyner, Jr.

APPENDIX E

OFFICE OF GENERAL COUNSEL

MEPUS - New Orleans

May 1. 1990

TO: I. C. KEELER – RM. 1073

CC: R. J. FRITZ - RM. 2022
E. R. GOODWIN - RM. 1774
F. K. JOYNER, JR. - DALLAS

INDEPENDENT CONTRACTOR VS. EMPLOYEE STAFFING FOR AVIATION

This will follow-up our recent discussions on this subject. You have asked for legal advice an the best way to handle your present staffing which consists of a mixture of employees and "independent contractors" working side-by-side at similar functions supervised by you and other MEPUS employees. in our recent meeting we reviewed the guidelines which Kim Joyner of Dallas OGC issued earlier this year based an the IRS criteria. The following are my preliminary thoughts and recommendations.

1. The personnel in question are all professional or highly skilled/trained people such as aviation mechanics. The "independent contractor" folks largely meet the criteria set forth in Kim Joyner's guidelines. So also, in my view, do the employees which would be hired under the Jet Professionals,

Inc. contract which Ray Timberlake recently presented for my review.

2. Your present circumstances are a hybrid of salaried employees and "independent contractor" types who are functionally similar to employees. There is, therefore, the potential for claims by these independent contractors that they are in fact employees and are entitled to all Mobil benefits. This kind of claim could arise now or much later depending on how the issue might come up, e.g. termination or retirement.

3. There are two alternatives which can reduce or eliminate your exposure: (a) Converting the outside people to the Mobil payroll. This would enable you to exert all of the controls of an employer so that you can maintain your higher- than- industry standards for training and quality (of course, at the expense of the Mobil benefit package); or (b) eliminating the employee staff and hiring an outside contractor to supply <u>all</u> skilled staff for your aviation group (at the expense of losing full control and perhaps quality).

4. A variation an alternative 3(a) above would be to create a Mobil corporate unit (wholly owned subsidiary) which would have its own benefit plan and which would employ all of your aviation staff. This would enable MEPUS employees, as officers of the newly created corporate unit, to supervise and control the operations of the staff with a benefit program that need not be as extensive as the general

Mobil plan. As I mentioned, M&R has created such units to staff its salary operated service stations. I am in the process of obtaining copies of the documents, manuals, contracts, etc. used by M&R for this purpose so you can see how this concept works.

4. A variation on alternative 3 (b) above would be to create a standard independent contractor form which we would use with our outside contractors or personnel suppliers which would restructure the relationship to maximize "independent contractor" status. This is difficult to do if it is merely cosmetic. In other words, there needs to be some substantive changes in the relationship which means a reduction in your control. You may not wish to risk this and lower your standards or quality, believing that, after weighing the situation, the costs associated with a possible employment claim are less severe than the costs of accidents due to less than top quality staff.

I recommend that you evaluate these options and let me know your thoughts. I will be happy to work with you in pursuing any one of these avenues, or others which may occur to you.

/s/ ***Bill***
W. C. Whittemore